

A Quick Primer on the Sale or Exchange of Government Property under 40 U.S.C. 481(c)

Background information:

Proposals for sale or exchange of Government property, with the Government keeping or applying the proceeds, have to be examined in the context of two important fiscal law principles:

1) First is the miscellaneous receipts statute, 31 U.S.C. Sec. 3302(b), which essentially provides that moneys received on behalf of the Government have to be deposited in the general fund of the U.S. Treasury, unless one of several exceptions apply:

- there is specific statutory authority to apply the moneys to a specific account or use. For example, money received from AWCF sale as can be put back into the AWCF account. - OR -

- the receipt of money qualifies as a repayment to an appropriation (for example, collection of an erroneous overpayment, or recouped progress payments, or, in some instances, excess procurement costs)

2) The second problem is a corollary to the miscellaneous receipts doctrine, known as the augmentation of appropriations. The GAO Appropriations Law Manual explains it this way:

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. The prohibition against augmentation is a corollary of the separation of powers doctrine. When Congress makes an appropriation, it is also establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount congress has appropriated for that activity.

Simply stated, money from the sale or property would ordinarily have to go to the general fund and can't be applied to a specific contract. The fact that no money may change hands would not take the transaction outside of the rules; credits and property exchanges qualify as a "payment" for these purposes.

40 U.S.C. 481(c)

A statute that is receiving a lot of new attention is 40 U.S.C. 481(c), which provides that when an agency is acquiring an item, it can "exchange or sell similar items" and apply what it receives from the sale or exchange to the purchase. It's like buying a new car – you can either trade your old car in to the dealer and get money off the purchase price of the new car, OR you can sell the old car yourself and apply the proceeds to the new car purchase.

When DOD implemented this statute in DoD 4140-1.R, its use was limited to exchanges of property; however, on 29 August 1997, a two year waiver was granted to the Army, which now gives us permission to SELL property, as well.

This statute provides an exception to the miscellaneous receipts statute and the augmentation of appropriations rule. However, it contains some limitations, and it refers to other statutory requirements and federal property regulations that must be met before the authority can be used. It is important to understand and meet all the limitations and requirements; because it is an *exception* to a general rule (and the general rule carries some severe penalties for violation!), you will want to make sure that you fit within the exception by following all the necessary procedures. It may be possible that requirements of regulations can be waived upon request, but statutory requirements must *always* be complied with.

Rules relating to the property itself

Acquisition of new items. The statute makes clear that the sale or exchange must take place in connection with "acquiring personal property, " and that the proceeds or exchange allowance from the old property is used as payment, in whole or in part. The DOD regulation also provides that the "items to be acquired are required for approved programs." Similar language appears in the Federal Property Management Regulation (FPMR 101-46.202(b)(2)) (Note, there is no requirement that the approved program be funded, so arguably, there is a possibility of using sale or exchange for unfunded requirements.)

Nonexcess Property to be sold or exchanged. The property to be sold or exchanged cannot be excess, under the DoD regulation and the FPMR.

Federal Supply Classification Groups. The authority to sell or exchange cannot be applied to property in certain Federal supply classification groups *unless* a waiver is received from the General Services Administration, according to the DoD regulation. Those groups listed in FPMR 101-46.200(a) which are relevant to the TACOM mission include weapons, fire control equipment, valve, and hand tools.. (In addition, there is a further prohibition on use of the authority for any material controlled by the Nuclear Regulatory Commission, scrap, excess or surplus property, or strategic or critical material.)

Items must be “similar”. The statute uses the words, “may exchange or sell similar items... .” The DoD guidance uses the same wording. Neither define the term. However, the FPMR defines “similar” as meeting one of three conditions:

- (i) the old and new items are identical;
- (ii) the new item is designed and constructed for the same specific purpose as the replaced item, or both are parts or containers for identical or similar end items; or
- (iii) the old and new items are both within a single Federal Supply Group.

New items are replacements. FPMR 101-46.202(b)(3) requires a one-for-one replacement, with several exceptions. The DoD regulation, however, focuses on one of the exceptions by requiring that the “item or items to be acquired replace and perform substantially all of the functions of the item or items being exchanged.”

Special Rules concerning sales

Requirement for advertised sale. If property is sold, it must be done under 41 U.S.C. 5, which requires advertising and getting bids for the best price. The only exception to this provides that “fixed price sales may be conducted in the same manner and subject to the same conditions as are applicable to the sale of property pursuant to section 484(e)(5) of this title.” The latter referenced code section permits limited negotiated sales of property for particular categories of property as determined by the federal property administrator, with notification and explanation to Congress; the exceptions don’t apply in most instances in which TACOM-ACALA would want to use them.

Procedures for conducting advertised sales are contained in FPMR 101-45 and 101-46. They call for advertising, inspection by bidders, and sealed or spot bids. Sales can be conducted by GSA or the agency.

Time period for obligating proceeds. GAO policy and procedures apply. FPMR 101-46.304 provides that

- ⟨ when the old property is sold before the acquisition of the new property, the agency's account will be credited. The proceeds will be available for obligation for the acquisition of the replacement property during the fiscal year in which the sale is made, and for one fiscal year after.
- ⟨ when the old property is sold after the acquisition of the new, the proceeds are deposited as a direct reimbursement credit to the appropriation previously charged for the replacement.

Rules concerning exchanges

There are no special rules for exchanges; however, since there must be a written determination of "economic advantage" to the Government (see below), care should be taken to establish a reasonable figure for the exchange allowance.

Rules concerning documentation and reporting

Old/new items. Detailed cross-references are not required, but some record must substantiate that the new items were similar to the old items and that any allowances applied were, in fact, available.

Written determination. The DoD regulation requires a written determination of economic advantage by the acquiring activity, indicating:

- 1) the anticipated economic advantage to the Government;
- 2) that the sale/exchange allowance is being applied in payment for the items being acquired; and
- 3) that, if required, the property has been rendered safe or innocuous, or has been demilitarized.

(With regard to the economic advantage, there should be some discussion about whether sale or exchange will obtain the better return for the Government. (see FPMR 101-4.201-1) With regard to demilitarization, the FPMR requires demilitarization if found by an agency official to be in the best interest of public health, safety, or security; in an abundance of caution, the

determination should explain the converse, that is, why particular military items are not being demilitarized for sale or exchange.)

Written evidence of the transaction. Any sale or exchange transaction must be evidenced in writing. FPMR 101-46.200.

Recording of acquisition cost. Under the DoD reg, property acquired through sale or exchange is to be recorded at acquisition cost. Similarly, the credit received through sale or exchange is considered the selling price of the old property and should be accounted for as a in or loss.

Annual Report. Each DoD component is to submit an annual (fiscal year) report to DLA , due by November 30.

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